

**SUBJECT: Implementation of the HUD Lead-Based Paint Regulations @ 24 CFR
Part 35 for MSHDA ESG Recipients
Policy Bulletin #28**

EFFECTIVE DATE: January 10, 2002

The purpose of this Bulletin is to provide guidance to Michigan State Housing Development Authority (MSHDA) Emergency Shelter Grant (ESG) recipients regarding the implementation of the new HUD Lead-Based Paint regulations at 24 CFR Part 35.

On September 15, 1999, HUD published a Final Rule at 24 CFR Part 35 to implement new regulations with regard to Lead-Based Paint in compliance with the Residential Lead-Based Paint Hazard Reduction Act of 1992. The Rule took effect on September 15, 2000.

The new Rule amended the ESG regulation at 24 CFR 576.57 to apply the new Rule to ESG activities.

HUD issued Transition Assistance Notice permitting jurisdictions to make a Statement of Inadequate Capacity to Comply with the new Lead Safe Housing Regulation. The state submitted the required documentation to defer implementation to August 10, 2001 for HOME and Community Development Block Grant (CDBG) funded activities. The state filed for an extension until January 10, 2002, to implement the Regulation for ESG activities.

Further extensions are not anticipated, but may be provided by HUD at a later date. Recipients will be notified of any further extensions.

This policy will cover the following topics as it applies to the new federal regulation:

- 1. Applicability of the Regulation**
- 2. Covered Activities**
- 3. Exempt Properties and Activities**
- 4. Training and Certification Requirements**
- 5. Requirements by Activity Type**
- 6. Administrative Requirements**

1. Applicability of the Regulation

The rules and policies discussed herein are applicable to:

- All ESG awards made by MSHDA to recipients subsequent to 01/10/02; and
- For ESG awards made prior to 01/10/02, the rule applies to any specific projects, properties or households for which assistance is first “obligated” on or after 01/10/02.

“Obligated” means that the State recipient (unit of general local government or nonprofit organization to which a State makes available grant amounts) has placed orders, awarded contracts, received services, or entered similar transactions that require payment from the grant amount. (Grant amounts that a State recipient awards to a private nonprofit organization by a written agreement or letter of award requiring payment from the grant amount are considered obligated.) Therefore, the obligation occurs when the local recipient selects a project, property

or household to be assisted and enters into a written agreement to provide that assistance. For rental assistance, it would be the housing assistance payment (HAP) contract.

The following activities are not subject to the policy outlined herein and may be completed under the pre-existing LBP requirements of the program, as applicable:

- For ESG grant awards made by the state prior to 01/10/02, any obligation of grant funds by the State recipient that is under written agreement prior to 01/10/02.

This would include ongoing rental assistance payments under a housing assistance payment contract executed prior to 01/10/02. However, renewal of the HAP contract upon expiration would be subject to the new rule.

If a unit or facility is to be occupied by a child under the age of 6 who has been identified as having Environmental Intervention Blood Lead Levels (EIBLL), the Michigan Department of Community Health (through its county health affiliates) has authority under this rule and other Federal and State rules to conduct assessments and require hazard reduction activities above and beyond what is specified in this memo. Nothing in this policy memo is intended to compromise MDCH's authority in such cases. Recipients are required to give full cooperation to health officials in such cases, and ensure full compliance by property owners with any health agency requirements.

2. Covered Activities

The new rule covers a range of activities. The subpart of the new regulation that is applicable to an ESG-funded program or project depends upon the specific use of the HUD funds. The most common uses of ESG funds (and the applicable regulation Subpart) include:

- Acquisition – Use of Federal funds for purchase of a shelter, transitional or permanent housing facility that is non-exempt (see above) is subject to **Subpart K** of the rule.
- Rehabilitation – Use of Federal funds for a project that includes rehabilitation of a non-exempt shelter, transitional or permanent housing facility is subject to **Subpart J**.
- Operating assistance to housing facilities – Use of HUD funds to pay for real estate operating costs (e.g., taxes, insurance, maintenance) in a non-exempt facility is subject to **Subpart K**.
- Tenant-based rental assistance – Use of ESG funds for tenant-based assistance for a period longer than 100 days is subject to **Subpart M**.
- Emergency homeless prevention rental or foreclosure prevention assistance – Provision of less than 100 days of assistance to a unit is exempt under 35.115(a)(11). Assistance that is over 100 days (e.g., security deposit assistance on a lease of over 100 days or foreclosure prevention payments exceeding 100 days) but is not ongoing rental assistance is subject to **Subpart K**.
- Non-housing services – Use of ESG funds only for the payment of non-housing services (e.g., transportation, medical, nutrition, employment or other social services) is not considered housing assistance, and therefore is **exempt**.

Use of the HUD funds for more than one of the above uses requires the recipient to adhere to the most stringent regulatory requirement. Rehabilitation (Subpart J) is the most stringent requirement. Subpart K is more stringent than Subpart M as it applies the requirements to all assisted units, not just those occupied by a child under the age of 6.

Further guidance on these activities is provided in HUD's Interpretive Guidance (9/21/00), Questions for K1 – K7 and M4 – M5.

3. Exempt Properties and Activities

If an ESG-assisted facility or unit does not meet one of the six exemptions described below, then it is subject to the Federal rule.

If the property is subject to the rule, then the LBP standards and requirements apply to the interior and exterior of the entire residential structure, including all residential units (whether or not assisted) and shared or common areas and egresses. It also applies to any outbuildings, including garages, which are used by the residents. Soil standards apply if the property is subject to a risk assessment (i.e., rehab in excess of \$5,000 per unit or a EIBLL child present). Non-residential spaces within a residential or mixed-use facility are exempt from the rule.

While most HUD Emergency Shelter Grant (ESG) program activities are subject to the new Lead Based Paint rule at 24 CFR Part 35 as outlined above, some ESG-assisted housing facilities may qualify as an exempt facility. In particular, residential facilities are exempt from the rule if any of the following apply:

1. The structure was initially constructed and completed after 1/1/78 – Recipients should have documentation of the original completion date of the structure (e.g., a Certificate of Occupancy or other legal document approving occupancy);
2. The property is non-residential – Properties that do not provide overnight accommodations are not subject to the rule;
3. The property is restricted to occupancy only by elderly or the disabled (except that if a child under the age of 6 is present or expected to reside, then the unit is still subject to the rule) – Recipients should have evidence of deed restriction or other restrictive agreement that limits occupancy;
4. The structure has been certified to be lead-based-paint free or lead-based paint removed – Recipients should have copies of the inspection that identifies the property as LBP free or removed;
5. The residential structure consists only of zero-bedroom units – see below; or
6. In the case of emergency rental assistance or foreclosure prevention assistance, the assistance to the unit does not exceed 100 days – see below.

Zero-Bedroom Exemption. Many ESG-assisted facilities may qualify as “zero-bedroom” residential facilities, as 35.110 defines zero-bedroom to include any residential facility that does not have separate living and sleeping quarters, including such typical shelter configurations as dormitories and rooms without kitchens or baths.

The exemption for zero-bedroom dwellings was based on the assumption that children would not occupy most zero-bedroom units. Acknowledging that some zero-bedroom shelter facilities will be occupied by children and pregnant women, HUD “recommends that you adopt and implement a policy that assures that the child-occupied spaces (in an exempt shelter) will be lead safe, when the units are occupied by children of less than 6 years of age.” (Interpretive Guidance, 9/21/00, Question K1)

MSHDA will adhere to the regulatory requirements as described above and HUD's guidance. However, even if a facility might qualify as exempt under the Federal rule, but it is an emergency, transitional or permanent housing facility that serves children and/or pregnant women, the State recipient and housing owners/operators are required by MSHDA to follow safe work practices and paint maintenance standards to ensure child safety. Therefore:

1. ESG-assisted facilities that do not meet the zero-bedroom definition (i.e., consisting of one or more bedroom units) or other exemption are subject to the requirements of the applicable section of the rule.
2. ESG-assisted facilities that serve only adult males and meet the zero-bedroom unit definition are recognized as exempt from the rule and are not required to implement special lead-based paint procedures.
3. ESG-assisted facilities that meet the zero-bedroom definition, but may serve children and/or pregnant women, are recognized as exempt from the Federal rule. However, these facilities are required by MSHDA to implement annual visual assessments, safe work practices and paint maintenance standards. Visual clearance should be conducted following any paint maintenance; dust wipes as part of clearance are optional to the recipient.

Homeless Prevention Assistance of Less than 100 Days. The rule (35.115(a)(11)) indicates that foreclosure prevention or emergency rental assistance for terms of less than 100 days also is exempt. That would include mortgage or rent payments of no more than 3 months.

However, this exemption does not extend to an emergency shelter just because it limits occupancy to less than 100 days. The 100-day threshold applies to the unit, not an individual occupant of a unit. Ongoing assistance to a shelter project/unit for more than 100 days nullifies this exemption.

Also, security deposit assistance on a lease of more than 100 days would not fall into this exemption category, but instead would be subject to Subpart M.

Rehabilitation. – If the ESG funds are being used for rehabilitation, then different standards and exemptions apply, and recipients should read MSHDA OCD Policy Bulletin #26, which fully described rehabilitation requirements.

If an ESG recipient believes that it has a property that is exempt under one of the conditions listed below, it should confirm that determination with MSHDA if there is any doubt about the interpretation of exemption eligibility, and include documentation in the file as evidence for exemption.

4. Training and Certification Requirements

Any work subject to abatement standards (i.e., Federal rehabilitation assistance in excess of \$25,000 per unit) must meet all training and certification requirements of the Michigan Department of Community Health (MDCH). Recipients should require documentation of appropriate certifications, and contact the Michigan Department of Community Health at 517-335-9390 to verify compliance with certification requirements. Abatement activities are likely to be triggered only when rehabilitation in excess of \$25,000 per unit or abatement activities are prescribed by a Department of Community Health official when a child with Environmental Intervention Blood Lead Level (EIBLL) is present in the unit.

Any interim control, standard treatment or paint stabilization work (when LBP is present or presumed to be present) must be done either by:

- Workers who have attended any of the following courses:
 - Lead Based Paint Training for Remodelors and Renovators
 - Lead Based Paint Maintenance Course
 - Abatement worker training approved by MDCH
 - Other courses approved by HUD
- Workers working under the direct supervision on-site of a supervisor who has been certified as an abatement supervisor by MDCH

LBP inspectors or risk assessors certified by MDCH must do clearance of abatement work. Certified inspectors or risk assessors may do clearance of interim control work, standard treatments or paint stabilization. Clearance sampling technicians who have completed the EPA/HUD approved course and (when announced by MDCH) received certification by MDCH may also do clearance of interim control, standard treatment or paint stabilization work. Until MDCH certification is in place, completion of the approved EPA/HUD course shall be sufficient.

It is recommended, but not required, that rehab specialists, inspectors or other recipient staff that regularly are on site during rehabilitation, repair or paint stabilization activities attend one of the above courses or other course outlining safe work practices.

5. Requirements By Activity Type

The requirements for each type of housing assistance are described below. A summary matrix is attached. However, recipients are cautioned to read the applicable sections of the Rule and other HUD guidance.

As a structure for explaining the requirements for each type of activity, the requirements are summarized in five key steps:

1. Evaluation – Activities required to determine the presence of deteriorated paint, lead-based paint, or lead-based paint hazards;
2. Disclosure – Information that must be provided to owners/buyers and occupants regarding LBP;
3. Work Practices – Procedures that must be followed to conduct the work so as to protect the occupants and workers;
4. Clearance – Steps taken to ensure that any lead hazard control work has left no debris or dust and to determine that the work site is ready to be re-entered by other workers or occupants; and
5. Ongoing Maintenance – When rental properties have ongoing compliance agreements that require compliance with property standards, the actions taken to maintain, inspect and repair painted surfaces.

The actions taken at each of these steps varies by type of activity.

Housing Rehabilitation –

See Policy Bulletin # 26

Acquisition Assistance, Operating Assistance, Emergency Rental/Foreclosure Assistance > 100 Days (including Security Deposit Assistance) – Subpart K

The following guidelines apply to all projects or units that receive ESG assistance for:

- Acquisition without rehabilitation (if rehabilitation is included in the acquisition project, then the rehabilitation standards in MSHDA Policy Bulletin #26 apply)
- Operating assistance, including payment of any real estate operating cost of a residential facility or shelter; and
- Rental or Foreclosure Assistance of greater than 100 days, including security deposit assistance on a lease of more than 100 days, payment of more than 100 days rent or mortgage costs but not including ongoing rental assistance (which is subject to Subpart M), or other form of assistance that pays housing expenses of more than 100 days.

LBP Requirements – Acquisition, Operating, Emergency Assistance

1. Evaluation – Program/project administrators must utilize HUD's **Visual Assessment** methodology to identify defective paint surfaces in all pre-78 units to be assisted.
2. Disclosure – No additional disclosure is required for Visual Assessment results. Basic disclosure (EPA Protect Your Family brochure and Notice of KNOWN LBP or LBP Hazards) is the responsibility of the owner.
3. Work Practices – If defective paint surfaces are found in the Visual Assessment, repairs must be done using **Paint Stabilization** methods (done by workers trained in safe work practices). **Safe Work Practices** apply above the de minimus levels.
4. Clearance – If Paint Stabilization occurs, **worksite clearance** by a qualified professional (inspector, risk assessor or certified clearance sampling technician) is required.

Ongoing Tenant-Based Rental Assistance – Subpart M

If ESG funds are used to assist tenant households with ongoing rental assistance (generally assumed to be a year or more), the following standards apply. If the assistance is not ongoing, but is only temporary, then apply the guidelines described above under Subpart K.

Part 35 requirements are not applied to a household with no child under the age of 6. However, if a child under the age of 6 is present or expected to be present during the lease period (e.g., pregnancy), then the standards below apply to the unit and must be applied by the local administrator.

Tenant-Based Rental Assistance – If Child < 6 Present

1. Evaluation – The property must be subject to a **Visual Assessment** for deteriorated paint (interior and exterior).

2. Disclosure – No additional disclosure is triggered by visual assessment. Basic disclosure (EPA Protect Your Family brochure and Notice of KNOWN LBP or LBP Hazards) is the responsibility of the owner.
3. Work Practices – If defective paint surfaces are found in the Visual Assessment, repairs must be done using **Paint Stabilization** methods (done by trained workers). **Safe Work Practices** apply above the de minimus levels.
4. Clearance – If Paint Stabilization occurs, **worksite clearance** by a qualified professional is required.
5. Ongoing Maintenance – **Annual Visual Assessment** is required during any MSHDA compliance period.

6. Administrative Requirements

The following administrative requirements apply to all projects that are subject to this policy.

Recordkeeping – The lead regulation at CFR 35.175 requires maintenance of records for a minimum three years, after completion of a project activity. ESG regulations require records be kept for four years after the grant term expires. However, it is strongly recommended that recipients maintain documentation of appropriate LBP procedures (evaluation, disclosure, work practices, and clearance) in retrievable files indefinitely to address any legal or liability issues that may arise. Required file documentation includes at a minimum:

- Property Exemption Form, if applicable
- Visual assessment report (or other report as applicable)
- Evidence of LBP Disclosures by owners to occupants
- Evidence of paint stabilization worker training, if applicable
- Record of any inspections or confirmation of safe work practices followed during paint stabilization
- Clearance reports as applicable

Summary of Required LBP Hazard Control by Type of Federally Assisted Activity (based on 24 CFR Part 35)

Activity Requirement	Rehabilitation (less than \$5,000 Federal)	Rehabilitation (\$5,000 - \$25,000 Federal)	Rehabilitation (over \$25,000 Federal)	Acquisition (no rehab), Operating & Homeless Prevention Assistance	Ongoing Based Assistance	Tenant- Rental
Applicable Regulation Subparts	Subpart J			Subpart K	Subpart M	
Evaluation	Test painted surfaces to be disturbed (or presume LBP)	Risk Assessment	Risk Assessment	Visual Assessment to identify defective paint surfaces	If child < 6, Visual Assessment to identify defective paint surfaces	
Disclosure (beyond EPA/HUD notice & pamphlet)	Disclosure of any paint test results & hazard control work to be performed	Disclosure of risk assessment results & hazard control work	Disclosure of risk assessment results & hazard control work	No additional disclosure triggered by Visual Assessment		
Work Requirements	(Safe Work Practices; de minimus levels)	Interim controls for any LBP hazards	Abatement of any LBP hazards	If Visual Assessment finds defective surfaces, Paint Stabilization		
Clearance (visual assessment & dust wipes)	Clearance of any hazard control work sites	Clearance of entire unit	Clearance of entire unit	Clearance of Paint Stabilization work sites		
Ongoing Maintenance	If rental housing with ongoing compliance agreement: annual visual assessment, paint stabilization, clearance			If ongoing assistance to rental property, annual visual assessment, paint stabilization, clearance	Annual assessment, visual stabilization, paint clearance	

Property Exemption Form

Applicability of 24 CFR Part 35 To Federally Assisted Housing Projects

Is the Property Subject to the Federal Rule?			
	Yes	No	Conclusion
1. Was the property constructed after 1977 (completion of construction after to 1/1/78)?			If "yes", property is exempt
2. Does the property qualify for an exemption?			If "yes" to any, property is exempt (but MSHDA policy of safe work practices apply)
a. Zero-bedroom dwelling(s)			
b. Restricted elderly/handicapped occupancy (& no child under residing or expected to reside)			
c. LBP-free or LBP removed			
d. Unoccupied, pending demo			
e. Non-residential facility			
3. Does the assistance qualify as exempt?			If "yes" to either, rehab action is exempt
a. If rehab, no painted surface disturbed			
b. Emergency repairs in imminent danger situation			
c. Assistance qualifies as emergency rental or foreclosure assistance of less than 100 days			
Conclusion: If "yes" to any item 1 – 3, property is exempt, and compliance is not required. If all items 1 – 3 are "no", then the Federal rule applies.			